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No. 71-1308

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

WALTER PRITCHARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General;

HENRY E. PETERSEN,
Assistant Attorney General,

BEATRICE ROSENBERG,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1972. A petition for rehearing was denied on March 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in instructing the jury with regard to the credibility of accomplice testimony, the trial

court committed reversible error by referring to the government's principal witness as "an accomplice of the accused in this case."

2. Whether the prosecutor was guilty of misconduct in his closing argument.

3. Whether the trial court erred in permitting a government witness, impeached by a showing of a prior inconsistent statement, to explain the reasons for the inconsistency.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of having conspired to violate 18 U.S.C. 1952 and of a substantive violation of that provision by travelling from Chicago, Illinois, to New Orleans, Louisiana, with one William Wangard, an unindicted co-conspirator, for the purpose of carrying on a business enterprise involving gambling. He was sentenced to three years' imprisonment and fined $5000. The court of appeals affirmed.

The pertinent evidence is set forth in the opinion of the court of appeals (Pet. App. 4a-5a). Briefly, it showed that in the summer of 1963 petitioner asked Wangard, an electronics engineer, to modify a tape recorder for use in recording telephone conversations and thereafter asked him to build a portable transmitter-receiver pair with a range of one to ten miles (Tr. 54-56). Wangard believed that petitioner intended to use the equipment in connection with his work as a private investigator. However, in Janu-

ary 1964 petitioner told Wangard that he planned to use the receiver-transmitter units in a past-post betting scheme involving three people. "One would be inside the track with a transmitter, the second person would be outside the track in a car with a receiver awaiting the race result from the inside man, and upon its receipt would then telephone [petitioner's] apartment in Chicago to relay the name of the winning horse to a third person who was to place the bet" (Pet. App. 4a; Tr. 62).

On January 7, 1964, petitioner and Wangard, who accepted petitioner's invitation to join the scheme, drove from Chicago to New Orleans, where Wangard acted as the inside man, transmitting the name of the winning horse according to a pre-determined code, and on several other occasions acted as outside man (Tr. 63-67). After eight days in New Orleans petitioner and Wangard left for Miami, where the past-post betting scheme was again carried out for three days, with Wangard acting as the inside man (Tr. 69-71).

Subsequent to Wangard's return to Chicago on January 21, 1964, he was contacted by the F.B.I. (Tr. 89-93). In a conversation with petitioner in May 1964, Wangard told him that "he had told the FBI that he did not transmit or receive any race results; that he thought the defendant was in New Orleans and Miami on some sort of industrial espionage work; that the witness' work there was strictly technical as far as the electronic equipment was concerned; and that he had been left alone a lot

of the time, and had gone to the race track because he had nothing better to do" (Pet. App. 4a-5a).

Other government witnesses (Fullmer and Payne) corroborated Wangard's testimony concerning the presence of Wangard and petitioner in New Orleans and Miami on the dates in question (Tr. 136-140, 142-144). William Eiland, an electronics technician, testified that in October 1963 he had mentioned that there was a time lag between the time a race is run in one place and the receipt of the information in Chicago. Several days later, petitioner asked Eiland about the possibility of using a citizen's band radio for transmitting information from the race track. Eiland said that, although such a radio could be used, it was dangerous because of the likelihood of monitoring, and that other, safer equipment existed (Tr. 16-20).

The main witness for petitioner was Joseph McClellan, who operated a tavern in Chicago. McClellan testified that in January 1964 Wangard telephoned him from Florida and requested that McClellan wire $40, which Wangard needed to return to Chicago. Wangard said that he and petitioner were working on an industrial espionage case in Florida (Tr. 164-166). McClellan further testified that Wangard's reputation for truth and honesty was bad (Tr. 170).

ARGUMENT

1. Petitioner argues (Pet. 6-10) that, since the testimony of Wangard was necessary to establish

the fact that a crime had been committed, it was error for the trial judge to charge as follows (Tr. 282):

> An accomplice is one who voluntarily participates in the commission or the planning of a crime. The witness William Wangard is an accomplice of the accused in this case. As an accomplice his testimony must be closely examined and weighed with great care.

These instructions were part of a full charge on the general question of credibility, making clear that it was for the jury to determine the credibility of the witness (Tr. 281-283). The accomplice instruction, within the framework of these general credibility instructions, was merely cautionary, designed to benefit petitioner by calling to the jury's attention that an accomplice's testimony "must be closely examined and weighed with great care" (Tr. 282). Since Wangard's testimony, if credited at all, clearly showed him to be involved in a crime, the instruction had no potentiality for prejudice.[1] The court below properly found that, even if the instruction were erroneously worded, the error was harmless.

2. In his closing argument, the prosecutor made several references, without objection by the petitioner, to the submission that Wangard's testimony was

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[1] In *United States* v. *Balodimas*, 177 F. 2d 485 (C.A. 7), relied on by petitioner, the court of appeals reversed the conviction for the specific reason, inapplicable here, that the "accomplices," who had no knowledge regarding the falsity of the tax returns filed by the defendant, were not actually accomplices.

true and correct and to the fact that it was uncontradicted (Pet. 11). The court of appeals rejected petitioner's contentions, reiterated here (Pet. 11-14), that these remarks amounted to improper comment on petitioner's failure to testify in his own behalf. Such impropriety would exist only where "no one other than the defendant could have contradicted Wangard's testimony" (Pet. App. 7a-8a). The court of appeals found that the record did not show this to be the case here. McClellan's testimony regarding his conversations with Wangard, in which Wangard stated that he and the petitioner were in Florida working on an industrial espionage case, did tend to contradict Wangard's testimony. Evidence that petitioner had in fact been so engaged could have been offered, if it existed, to further contradict Wangard's testimony.

The court of appeals also concluded that, viewed in context, the prosecutor's statement about the truth of Wangard's testimony did not constitute an improper vouching for the witness' testimony (Pet. App. 8a). The prosecutor's comment in no way suggested that it was based on personal knowledge or on any matter not in the record. The jury was properly instructed that arguments of counsel were not evidence and that the jury was to determine each witness' credibility (Tr. 266). In these circumstances, any possible error in the prosecutor's remarks did not affect petitioner's substantial rights or constitute plain error. See *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15; *United States* v. *D'An-*

tonio, 363 F. 2d 151, 155 (C.A. 7), certiorari denied, 385 U.S. 900.

In commenting in his closing argument upon McClellan's testimony concerning Wangard's reputation, the prosecutor stated: "I don't believe Mr. McClellan liked Mr. Wangard, and I think any defense attorney can go and find someone who doesn't like you or me." Upon counsel's objection, the trial judge cautioned the prosecutor to "keep your conjectures within the realm of possibility" (Tr. 256-257). The court of appeals correctly concluded that the prosecutor's comment, although improper, did not warrant reversal of petitioner's conviction (Pet. App. 8a). The comment was isolated and not repeated. The trial judge specifically instructed the jury that "statements and arguments of counsel are not evidence" (Tr. 266).

3. On cross-examination Wangard admitted that his statements to petitioner regarding his conversation with the F.B.I. were false. On redirect he testified that the reason for making such false statements was his fear of what the petitioner might do if he knew what had actually been said (Tr. 128-130). While recognizing that normally a witness, impeached by a showing of inconsistency, may explain the reasons for the inconsistency, petitioner argues (Pet. 21-23) that here the evidence should not have been admitted because there was no explanation of the basis for Wangard's fear. The absence of a more detailed account of the reasons for Wangard's fear does not detract from the accepted

principle allowing an impeached witness to explain the inconsistency in his testimony. Petitioner's counsel had the opportunity on re-cross examination to explore the basis for Wangard's fear but chose, for reasons not reflected in the record, not to seek a more detailed explanation.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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